

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 7, 2003 Session

JOSEPH NEIL NOLEN v. AMY JAY NOLEN

Appeal from the Chancery Court for Hickman County
No. 01-260C Donald P. Harris, Judge

No. M2002-00138-COA-R3-CV - Filed August 5, 2003

WILLIAM B. CAIN, J., concurring.

For reasons articulated in *Estate of Acuff v. O'Linger*, 56 S.W.3d 527 (Tenn.Ct.App. 2001)(application to appeal denied) and in *In re: Z.J.S. and M.J.P.*, 2003 WL 21266854 (Tenn.Ct.App. June 3, 2003)(Cain, Judge, concurring), I cannot agree that T.R.A.P. 13(d) provides the proper standard of review in cases where the finder of fact is required to determine upon "clear, cogent and convincing evidence" that the controlling facts are "highly probable." In such cases, tried non-jury, an appellate court must independently review the evidence and determine whether "clear, cogent and convincing evidence establishes that such facts are "highly probable." Such is the standard of review that was used in *Estate of Acuff* wherein this Court held that a "clear and convincing evidence" standard is incompatible and irreconcilable with a "preponderance of the evidence" standard.

Since the evidence in this case reviewed under the "clear and convincing evidence" standard applied in *Estate of Acuff* clearly establishes the facts as found by the trial court to be "highly probable," I concur in the judgment.

WILLIAM B. CAIN, JUDGE